IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.427 OF 2006

Maharashtra State Road Development Corporation Ltd, a Government of Maharashtra undertaking having its office at Nepean Sea Road, Priyadarshini Park, Mumbai 400 036. ..Petitioners

Versus

M/s.Hindustan Construction Co.Ltd & M/s.B.G.Shirke Construction Tech.Pvt Ltd (JV), a company incorporated under Companies Act, having their office at Hincon House, L.B.S. Marg, Vikhroli (W), Mumbai 400 083. ..Respondents

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Shri E.P.Bharucha with Ms.Sowmya Shrikrishna i/by M/s.Amarchand & Mangaldas & Suresh A. Shroff and Company for the Petitioners.

Shri Virag Tulzapurkar, Shri S.U.Kamdar, Shri Vineet Naik, Ms Anuja, Ms Neha Chaudhary i/by Naik, Naik, Iyer & Company for the Respondents.

CORAM : ABHAY S.OKA, J.
DATED : SEPTEMBER 05, 2007.

ORAL JUDGMENT:

1. The submissions of the learned counsel appearing for the parties were heard on 30th August, 2007 and today the Petition is kept for dictation of judgment.

2. This is a Petition filed under section 34 of the Arbitration and Conciliation Act, 1996

(hereinafter referred to as the said Act of 1996). The challenge in this Petition is to an Award made on 14th June, 2006 by the Arbitral Tribunal consisting of a sole arbitrator.

3. With a view to appreciate the submissions made by the learned counsel appearing for the parties, it will be necessary to briefly refer to the facts of the case. The National Highways Authority of India had undertaken the work of four laning of National Highway 4 (NH4) from Bombay to Chennai. A section of the said National Highway from Satara to Kolhapur up to the border of Maharashtra State was assigned by the National Highways Authority of India to the Maharashtra State Road Development Corporation Limited (Petitioners herein) for implementation of work of four laning of the said portion. The Petitioners were supposed to carry out the work from preliminary design to final completion. The Petitioners invited bids for the said work. The Respondents submitted the bid for the said work known as "Package V" (Km 697 to Km 725). The contract was awarded by the Petitioners to the Respondents. The contract was executed on 06th March, 2002 for total value of Rs.91.33 crores.

4. The work of four laning was to be completed in

a phased manner as set out in the contract with specific reference to particular mile stones. The Respondents by their letter dated 14th July, 2003 stated that there was a delay on the part of the Petitioners in handing over the site of construction. Therefore, it was contended by the Respondents that the date of commencement of the contract ought to be 16th October, 2002 and not the 03rd May, 2002. On 06th October, 2003 the Petitioners responded by a reply pointing out that there was no provision in the contract of changing the date of commencement. By communication dated 20th October, 2003 a request was made by the Respondents to the Petitioners for extending the time for completion of the work by 200 days. The said request was rejected by the Petitioners on 03rd November, 2003. Therefore, a request was made by the Respondents for referring matter of extension of time to the Steering Committee. The request was made as there was a dispute as regards rejection of the request made by the Respondents for extension of time. The decision of the Steering Committee was communicated to the Respondents on 19th November, 2004. The Respondents invoked the arbitration clause and accordingly in terms of the contract, one Mr.A.K. Mago (Retired Chief Secretary) was appointed as sole Arbitrator. Before the learned

Arbitraator an objection was raised under section 16 of the said Act of 1996 by the Petitioners to some of the prayers in the Statement of Claims. The said Application was disposed of on 21st September, 2005 by the learned Arbitrator. The learned Arbitrator by order dated 21st September, 2005 held that the claims in terms of clauses (a) to (d) of paragraph No.16 of the Statement of Claim were within the scope of arbitration and the claims raised at item Nos.(e) to (g) were not the subject of the arbitration. By the impugned award the learned Arbitrator held that the claim (b) of the Respondents for extension of time by 200 days was justified. He directed that the completion dates of milestones 1 and 2 shall be re-worked. He held that consequently completion dates of milestones 3 and 4 will have to be re-worked. He accordingly directed the engineer as defined under the contract and the Petitioners to consider re-setting of milestone Nos.3 and 4.

5. It will be necessary to refer to the Statement of Claim filed by the Respondents and in particular the claims made therein. The first prayer in the Statement of Claim is that date of commencement shall be treated as 16th October, 2002. The second prayer is for extension of time of completion by period of

200 working days as foreseen on 14th July, 2003 though the Respondents claimed that they were entitled to extension of time for two years. The third claim was that extension of time up to 30th June, 2005 may be granted by treating date of commencement as 16th October, 2002. The fourth claim was as regards resetting MS-1, MS-2, MS-3 and MS-4. I am not referring to the other claims made in view of the order dated 21st September, 2005 passed by the learned Arbitrator holding that rest of the claims cannot be subject matter of arbitration.

6. The learned senior counsel appearing for the parties have made detailed submissions before me. The main submission made by the learned counsel appearing for the Petitioners is that no reasons whatsoever are assigned by the learned Arbitrator for granting extension of time by 200 days. He submitted that the Arbitrator ought to have assigned reasons as to why he has accepted the case made out by the Respondents of grant of extension of time by 200 days. He invited my attention to various findings recorded by the learned Arbitrator. He invited my attention to the documents at C-101 and C-103 and submitted that the learned Arbitrator ought to have given reasons as to why period of 200 days has been specifically accepted by

him. He submitted that the Award made by the learned arbitrator is a non-speaking award. He submitted that mere reproduction of the reasons recorded by the Steering Committee and mere reference to the document at C-103 and annexures thereto does not amount to giving reasons. He submitted that the opinion of the Steering Committee recorded in the minutes of the meeting was not conclusive and binding and therefore case made out by the Respondents for grant of extension ought to have been considered and assessed by the learned Arbitrator not only on the basis of minutes of the meeting of Steering Committee but also after independently considering and appreciating the material available on record. He submitted that as the award does not reflect the basis upon which the learned Arbitrator has come to the conclusion that the Respondents are entitled to extension by 200 days. He submitted that the learned Arbitrator has not at all considered the modified terms of the contract. He invited my attention to the various terms of the contract which were modified subsequently. He submitted that the award needs to be set aside.

7. The learned senior counsel appearing for the Respondents has relied upon various decisions of the Apex Court and this Court as regards scope of

interference in a Petition under section 34 of the said Act of 1996. He submitted that it is not permissible to examine the merits of the findings recorded by the learned Arbitrator. He submitted that the learned Arbitrator has recorded reasons. He pointed out various paragraphs in the Award and in particular paragraph Nos.41, 43 and 44. He submitted that the learned Arbitrator has accepted the correctness of Annexure II and Annexure IV as well as Annexure VI to the document at Exhibit C-103. He pointed out that the said documents clearly establish the delay on the part of the Petitioners in handing over his site and the said documents also give all particulars with reference to the specific dates. He pointed out that the learned Arbitrator has recorded a finding that there was no satisfactory explanation or denial offered by the Petitioners to the instances of delay set out in the said annexures to document at Exhibit C-103. He pointed out that from paragraph 43 of the Award it appears that the learned Arbitrator was very much conscious of the amended terms of the contract. He submitted that the learned arbitrator was justified in giving direction to rework the completion dates of mile stones 3 and 4 as the completion dates of mile stones 1 and 2 were required to be reworked on the basis of extension of 200 days

granted by him. The learned senior counsel appearing for the Respondents has submitted that in view of various decisions relied upon by him (which are referred to in the later part of the judgment), this is not a case for interference with the award in exercise of section 34 of the said Act of 1996.

8. The learned senior counsel appearing for the Petitioners relied upon a decision of the Apex Court in the case of **Jajodia (Overseas) Pvt Ltd Vs. Industrial Development Corporation of Orissa Ltd [(1993) 2 Supreme Court Cases Page 106)**. He submitted that an Award becomes a speaking award only where reasons for conclusion are set out in the award. He submitted that in the present case the learned arbitrator has merely recorded his conclusions without recording the reasons for passing award. He, therefore, reiterated that the award deserves to be quashed and set aside.

9. Before adverting to the submissions made on merits, it will be necessary to refer to the various decisions relied upon by the learned counsel appearing for the parties. The submission of the learned counsel appearing for the Respondents is that scope of interference with the arbitral awards has been

considerably narrowed down under section 34 of the said Act of 1996 as compared to section 30 and section 33 of the Arbitration Act, 1940 (hereinafter referred to as the said Act of 1940). He placed reliance on what has been observed by the Apex Court in paragraph No.52 of the decision in the case of **McDermott International Inc V/s. Burn Standard Co Ltd [(2006) 11 Supreme Court Cases Page 181)** which reads thus:

> "52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or basis by the arbitrators, violation of natural justice, etc. **The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality**

offered by it". (Emphasis added)

10. The Apex Court also dealt with the requirement under the said Act of 1996 of assigning reasons in support of award. The Apex Court quoted with approval what has been observed in Bachawat's Law of Arbitration and Conciliation (4th Edition). The Apex Court approved the following observations made in the said book "Reason is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action. It is in this sense that award must state reasons for the amount to be awarded". In the said commentary a decision of Kerala High Court is quoted with approval which holds that "reasons are links between the materials on which certain conclusions are based and the actual conclusions".

11. The learned senior counsel appearing for the Respondents has relied upon a decision of the Apex Court in the case of **State of Uttar Pradesh Vs. Ramanath International Construction Pvt Ltd [(1996) 1 Supreme Court Cases Page 18]** where the Apex Court dealt with the grounds on which the interference can be made with arbitral award by invoking section 30 of the said Act of 1940. Paragraph 7 of the said

decision reads thus:

> "7. The jurisdiction of the court to interfere with an award of an arbitrator is undoubtedly a limited one. The adjudication of the arbitrator is generally binding between the parties and it is not open to the court to attempt to probe the mental process by which the arbitrator has reached his conclusion. Award of an arbitrator can be set aside by a court only on the grounds indicated in Section 30 of the Arbitration Act. **It is not open to the court to reassess the evidence to find whether the arbitrator has committed any error or to decide the question of adequacy of evidence and the court cannot sit on the conclusion of the arbitrator by re-examining and reappreciating the evidence considered by the arbitrator**. At the same time the arbitrator is a creature of the agreement itself and therefore is duty-bound to enforce the terms of the agreement and cannot adjudicate a matter beyond the agreement itself. If the arbitrator adjudicates a claim of a contractor with reference to the clauses of

> the agreement itself whereby the agreement gets engrafted into the award, it will be open to the court to examine those clauses of the agreement and find out the correctness of the conclusion of the arbitrator with reference to those clauses. Bearing in mind the aforesaid parameters for exercise of jurisdiction by the court in examining the legality of an award of an arbitrator, the award in hand as well as the order of the subordinate Judge and that of the High Court requires scrutiny". (Emphasis added)

12. The submission made is that the scope of interference under section 34 of the said Act of 1996 is much restricted than what is provided under section 13 of the said Act of 1940. My attention was invited to a decision of Division Bench of this Court in the case of **Vijaya Bank Vs. Maker Development Services Pvt Ltd (In Appeal No.1106 of 2000 in Arbitration Petition No.362 of 1999)**. The Division Bench in the said case referred to the decision of the Apex Court in the case of Konkan Railway Corporation Ltd & Ors Vs. Mehul Construction Company and noted that the grounds on which Award of the arbitrator can be challenged have been severely cut down under the said

Act of 1996.

13. Considering the law laid down by the Apex Court in the various decisions, it is obvious that while exercising jurisdiction under section 34 of the said Act of 1996 this Court does not possess a power to reassess the evidence for the purpose of ascertaining whether any error has been committed by learned Arbitrator. Similarly, this Court cannot go into question of adequacy of reason. In my view, the observation made by the Apex Court in the case of State of U.P (supra) that it is not open for the Court to attempt to probe the mental process by which the Arbitrator has reached his conclusion will also apply to a proceeding under section 34 of the said Act of 1996.

14. In the light of this legal position, the submissions of the learned counsel appearing for the parties will have to be appreciated. My attention has been invited to the relevant clauses in the contract executed between the parties. In the Award the learned Arbitrator has referred to the said relevant clauses. The relevant clauses are 41.1,41.2,42.2 and 44.1. The learned arbitration has also referred to the Arbitration clause. The dispute arising between

the parties was on the basis of the request made by the Respondents by their letter dated 20th October, 2003 and rejection of the said request by the letter dated 03rd November, 2003. As stated earlier the request was for extension of time for completion of work by 200 days.

15. The decision not to extend the time was by the Engineer and accordingly by invoking clause No.67.2 at the instance of the Respondent the dispute was referred to the Steering Committee. It will be necessary to refer to the minutes of the meeting held by the Steering Committee in which the decision of the Steering Committee has been noted. The meetings of the Steering Committee were held on 30th December, 2003 and 30th January, 2004. The minutes of the meetings show that two issues were discussed. The first issue was regarding declaring commencement date as 16th October, 2002 instead of 03rd May, 2002. The Steering Committee has recorded that the contractor’s request for fixing commencement date to be 16th October, 2002 cannot be accepted. The second issue was as regards resetting dates of mile stones 1 and 2 granting corresponding extension of time. What is recorded by the Steering Committee reads thus:

"Issue No.2 Re-setting dates on Milestone-I and II granting corresponding extension of time.

. From the details submitted by both the parties and oral submissions made, it is clear that land required to fulfil contractual obligations under various sub works of Milestone I and II is not fully (including removal of obstructions) handed over to the Contractor.

. In terms of contract, there is no possibility of re-defining various elements in the Mile Stones except by way of mutual agreement between two parties. **In these circumstances it is rather premature to consider the possible date of extension to be recommended at this stage. It can only be done after the land is fully made available as required to execute all sub works as per the definition of the Mile Stone I and II in the Contract. Therefore MSRDC is advised to make available the land fully to the Contractor and then consider the extension of time to achieve the Mile Stones if any such**

request is made by the Contractor".

(Emphasis supplied)

16. On plain reading of the said minutes it appears that the request made by the Respondents for grant of extension by 200 days and for resetting the dates of mile stones 1 and 2 was not rejected by the Steering Committee. The Steering Committee noted that land will have to be fully made available to the Respondents. The Steering Committee advised the Petitioners to make the land available to the Respondents as required to execute all sub works as per definition of milestones I and II in the contract and then to consider the extension of time to achieve the milestones if the request was made by the contractor. The Steering Committee accepted that the land required to fulfil contractual obligations of the work of milestones 1 and 2 was not fully handed over to the Respondents. It is stated that even obstructions have not been removed. It records that in terms of the contract there is no possibility of redefining various elements in the milestones except by way of mutual agreement between the two parties. Thus, the requirement of extending time for completion of work was accepted by the Steering Committee. However, no decision was taken as regards the actual

extension to be granted to the Respondents. As the said decision was not acceptable to the Respondents, clause 67.3 of the Contract was invoked and accordingly an Arbitrator was appointed.

17. Reliance has been placed by the Petitioners on document at Exhibit C-101 which is a communication made by the senior resident engineer of Stup Consultants Ltd to the Respondents. It stated that in the said letter the target for milestone 1 has been mentioned in Annexures I to III in the said letter. Annexure I mentions the milestones target time period provided and the date of completion. The Annexure II refers to status of land handed over. It also gives details of datewise length handed over. As per Annexure I the date of completion of milestone 1 was 07th February, 2003. Annexure II records that as per the contract on 05th March, 2002, 50% of the area was to be handed over. As per the contract, after 120 days, 90% of the area was to be handedover and infact by October 2002, only 88% area was handed over. 100% area was to be handed over on 03 January, 2003. However, by October 2003, 90% area was handed over to the contractor.

18. The Respondents have relied upon document at

Exhibit C-103 which is letter dated 14th July, 2003 sent by the Respondents to the senior resident engineer of Stup Consultants Limited. The reasons for delay have been set out in the said letter. They stated that one of the main reasons for time run-over was delay in handing over the stretches of road. The second reason given was that lack of clear availability of existing carriageway. Various other reasons such as obstacles, agitations and encroachments have been set out in the said letter. Annexures to the said letter are also relied upon by the Respondents. In Annexure II with reference to specific dates, obstacles and hindrances on site have been set out. Particulars of delay due to various factors such as stoppage of quarry work by local populance, encumbrances, disturbance by villagers etc are set out in the Annexure II. In Annexure VI particulars of delay/disturbance due to obstructions by the local populance have been set out. Annexure III is the statement showing impact due to delay in handing over of clear site. The Annexure IV deals with details of the delay incurred due to delay in issuing drawing. It must be stated here that in the said letter at Exhibit C-103 dated 14th July, 2003 it was stated that the Respondents were entitled to extension of about two years. However, they were

praying for extension of 200 days for completion of work with resetting the milestones I, II, III and IV.

19. Now coming back to the award made by the learned Arbitrator, it must be noted here that the learned Arbitrator has referred to the minutes of the meeting of Steering Committee in paragraph 38 of his Award including the observation of the Steering Committee that the land required to fulfil contractual obligations was not handed over to the Respondents. In paragraph No.41, the learned Arbitrator has referred to the claim for extension by 200 working days made by the letter dated 14th July, 2003 (Exhibit C-103). The learned Arbitrator held that possession of the site under the contract can only mean land/area of both the existing as well as new carriageway where the contractor is required to work as per the programme and milestones.

20. In paragraph 42, of the Award, the learned Arbitrator has referred to the fact that there are conflicting claims as regards percentage of the extent of land/length handed over to the contractor. After noting the said aspect, the learned Arbitrator in paragraph No.43 of the Award has referred to the relevant clauses of the contract relating to handing

over possession of the site. In the same paragraph the learned Arbitrator noted the direction given by the Steering Committee to the Petitioners to make the land fully available to the Respondents including removal of obstructions. In paragraph No.44 the learned arbitrator has held thus:

> "44. Consequently it is clear that the Respondent had failed to hand over all the land within time prescribed in the contract from achieving the milestones. Even on 30.01.2004, i.e more than one year after the contractual date for handing over entire land, the land had not been fully handed over without obstruction by the Respondent. **Further the claimant vide his letter dated 14th July, 2003 (Exhibit C-103 at page 230) has given numerous instances of obstacles and hindrances at site (Annexure II-Page 239 to 240) details of delays incurred in issue of drawings (Annexure IV-Page 242 to 244) and details of delay/disturbance due to obstruction by local populance (Annexure VI-Pages 245 to 246). There is no satisfactory explanation or denial of these instances of delay by the**

Respondent".(Emphasis supplied)

21. The learned Arbitrator thus found that even on 30th January, 2004 the land was not fully handed over without obstruction by the Petitioners. He noted that this was the position prevailing on expiry of more than one year after the contractual date for handing over the entire land. After considering all the aforesaid aspects, the learned Arbitrator has accepted the numerous instances of obstacles mentioned in Annexure II to Exhibit C-103 and delay in issuing drawing (Annexure IV) as well as details of delay and disturbance due to obstruction by local populance (Annexure VI). Thereafter he has held that there was no satisfactory explanation by the Petitioners to the aforesaid details mentioned in the Annexures to Exhibit C-103. It is also stated that there was no denial on the part of the Petitioners of the said instances set out in Annexures to Exhibit C-103.

22. The Steering Committee was appointed by the Petitioners. Apart from the question whether the report of the Steering Committee was binding on the Petitioner, it is obvious that the report of the Steering Committee and opinion expressed therein was certainly a relevant piece of evidence on record. The

Petitioners have not disputed the correctness of the recommendations the Steering Committee. The report of the Steering Committee and all the details of delay with reference to the dates given by the Respondents in document at Exhibit C-103 have been considered by the Arbitrator. As pointed out earlier, in Exhibit C-103 it was contended by the Respondents that they were entitled for extension of period of two years. However, they were restricting their request to extension of 200 days. Perusal of paragraph Nos.41,42 and 44 of the Award shows that the learned Arbitrator after considering all the documents on record has accepted the case made out by the Respondents on the basis of the details given in Annexures II, IV and VI to document at Exhibit C-103. If paragraph No.45 of the award is read in isolation one may carry an impression that no reasons are assigned for granting the extension of time by 200 days. The reasons for granting extension by 200 days are found in earlier paragraphs and in particular paragraph No.44. After consideration of documents on record the learned Arbitrator accepted the case made out by the Respondents on the basis of document at Exhibit C-103 and annexures thereto. The Arbitrator has specifically recorded that there was no explanation by the Petitioners to what was stated in annexures II, IV

and VI and there was no denial of the instances of delay by the Petitioners. The Arbitrator has referred to what is provided in amended clauses of the contract. After having accepted the case made out by the Respondents in the aforesaid document at Exhibit 103 it was not necessary for the Arbitrator to again reproduce what has been set out in the said document. Therefore, it is not possible to accept the submission made by the learned counsel appearing for the Petitioners that no reasons have been assigned by the learned Arbitrator. The Arbitrator has given reasons for accepting the case made out in letter at Exhibit C-103. Reliance placed by the learned counsel for the Respondents on the case of Jajodia (Overseas) Pvt Ltd (supra) will not help the Petitioners as it is apparent from the said decision that what has been observed by the Apex Court is in the context of the Award before it. In the present case there is elaborate discussion made by the learned Arbitrator of the documentary evidence on record including the report of the Committee appointed by the Respondents.

23. If the paragraph Nos.41 to 45 of the award are perused, it reflects the mental process adopted by the Arbitrator after considering the documentary evidence on record. Once it is held that there are reasons

recorded by the Arbitrator for coming to the conclusion recorded, the Award made by the Arbitrator cannot upset on the basis of alleged inadequacy of reasons. The evidence before the Arbitrator cannot be reappreciated by this Court in this Petition under section 34. In my view no case is made out for interference by invoking powers under section 34 of the said Act of 1996. The Petition is accordingly dismissed. The prayer is made by the counsel for the Petitioner for stay of operation of this judgment. The said prayer is opposed by the counsel for the Respondents. Considering the facts and circumstances operation of this order will remain stayed for a period of six weeks from today.

JUDGE